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THE SOURCES OF INTERNATIONAL LAW

INTERNATIONAL law has clearly reached a crisis in its development. For a period of nearly 300 years preceding the outbreak of the present war international law appeared to the casual observer to have grown steadily and progressively. The student of history was able to point out certain clear and definite advances in the development of the law and assign them to particular dates. Grotius could be pronounced the Father of International Law, and the year 1625, which marked the appearance of his great treatise, could be set as the beginning of the modern period. A noticeable improvement in the law of neutrality could be traced in the principles laid down by Vattel in 1758 and by the First and Second Armed Neutrality of 1780 and 1800. The formation of the Holy Alliance marked a reaction in the policy of intervention. The Declaration of Paris saw a reform in the rules of maritime war. And beginning with the Geneva Convention of 1864 down to the close of the Second Hague Conference a definite progress could be marked in the amelioration of the lot of non-combatants in war and in the restrictions put upon the methods and instruments of warfare; while as a check upon war itself arbitration courts had been provided and a general pronouncement obtained from the nations of the desirability of resorting to them. On the whole it seemed as if international law was developing with the times and adapting itself to modern ideals, and except on a few purely formal points it appeared to bear a fair comparison with the municipal law of the individual state.

A rude awakening came with the month of August, 1914. Whatever advances might have been set down to the credit of international law within recent years the bald fact stood out that international law had failed to stand the pressure put upon it and had collapsed at the very moment of greatest need. Of what avail was an elaborate law for times of peace if it was without authority to maintain

the condition of peace? Of what worth were restrictions upon the conduct of war when the restrictions, even if observed, still left war an evil of such vast proportions? The full measure of the illogical character of international law was thus taken in one swift moment of reflection. International law was clearly out of touch with the times.

The failure of international law to respond to the demands made upon it has been ascribed to various causes: in the first place international law has been shown to be a law without effective sanction, and by comparison with the municipal law of the individual state this defect has been made sufficiently clear; others have pointed out that international courts must be created for the settlement of disputes between states and resort to them in a given case made obligatory upon the parties; others still have urged that a permanent international conference should remain in session at the Hague, entrusted with a general guardianship of international interests and ready to act as mediator when conflicts of claims arise between the nations. It is the purpose of the present paper to direct attention to a serious flaw in the sources from which the law is drawn, and to suggest a reform in the methods of law-making at present followed by the nations.

The great body of international law has developed by what may be called an informal agreement of the nations. The rules of conduct which it prescribes, the rights and duties which it assigns to the states bound by it, are not the product of legislative enactment but have grown up by the slow process of common usage. This was necessarily the case in a community of states recognizing no common political superior, no supra-national power possessing the authority to impose its laws upon subject communities. From the legal as well as the political point of view the nations are no more than a group of independent units voluntarily agreeing to observe certain rules to which they have given their implied or express consent. These rules rest therefore upon a purely contractual basis, and have no element of the command of a political superior to a political inferior regarded by Austin as essential to true law. Whether they can nevertheless meet the conditions of law as an historical fact is a question apart from our present purpose; they are in any case not law in the same sense in which that term is at present used within the boundaries of the individual state.

Contract being the basis of international law we look for the sources of the law in the facts of international life which appear to embody an agreement of the nations to be bound by a given rule. The most important group of such facts are the practices of nations

which have been followed with sufficient regularity and consistency as to take the form of fixed custom. Custom thus embodies the implied consent of the parties following it. It has its origin in the free practice of individual nations; then in time other nations are led from motives of convenience or from the pressure of moral compulsion by their stronger neighbors to adopt the same practice, and in its last stage of development the particular rule has obtained sufficient standing to be quoted as a precedent for guidance in subsequent cases. Thus international law has followed more or less the lines of development of the early English common law, drawing its authority from tradition and testing the right of a particular claim not by the principles of abstract justice, but by the old familiar law of the land. It represents the legal relations of a community of states not yet sufficiently organized to define and codify their rights and obligations in detail, but nevertheless ready to appeal to the precedents of the past in proof of the legality of a claim in the present.

But custom as a source of international law, and indeed the chief source, is open to serious objections. The most serious of these objections is that customary law is an uncertain law. It is the culmination of a series of acts regularly observed and of principles consistently followed. But how are we to determine the number of reiterated acts which constitutes regular observance, or the frequency of the appeal to a principle necessary to show general acceptance? There has been no central court of the nations ready, as in the case of the common law courts, to apply the rules of customary law and to distinguish between irregular practice and the traditional rule. What adds to the difficulty in the case of international law is that the number of nations being relatively small there have been too few cases presenting substantially the same facts to make it possible to deduce a common rule from them, unless it be one of the most general character. When the United States argued before the Geneva tribunal that it was the duty of a neutral to prevent its ports from being used as a base of supplies for her enemy and as the starting point of hostile expeditions, her advocates could present no earlier cases in which that duty had been recognized under sufficiently similar circumstances to warrant an inference of legal obligation. The general principle appeared correct; its application to the particular facts was, although logical, nevertheless not familiar.

In the absence of a code of recorded custom we turn to the other evidences of accepted usage, but find them deficient in many respects. Jurists and scholars have undertaken to compile the rules of international law in force at the time of their writing, but the

record of international usage as presented in these treatises is not in all cases reliable. For it is only of recent years that writers as a body have adopted a strictly positive attitude towards international law. Many of the earlier works reflect the personal interpretation of the author, and are more concerned with the ideal rule of conduct than with the rule actually observed. A careful study of the classic work of Vattel, which exercised wide influence in the latter part of the 18th and beginning of the 19th centuries fails to reveal any clear line between the actual law as exhibited in custom and the law as the author conceived it should be. And if we turn from treatises to the decisions of national and international tribunals it is still more difficult to determine whether the rule followed by the court really represents the existing usage. In the case of national courts the theory is that international law is part of the law of the land and must be ascertained by the courts whenever cases involving such questions are presented to them. But few national courts have been altogether free from bias in their interpretation of the custom of nations. In the case of the *Paquete Habana* (175 U. S. 677) Mr. Justice Gray reviews the whole field of usage and treaty and juristic opinion in his search for the law on the status of captured enemy fishing vessels, and he reaches the conclusion, contrary to the claim of the United States, that their exemption from capture is "an established rule of international law" independently of any express agreement of the nations on the subject. A less liberal interpretation of custom may be seen in the case of the *West Rand Central Gold Mining Company v. Rex* [1905] 2 K. B. 391, where the court refused to recognize as a rule of international law the obligation of a conquering nation to succeed to the debts of the conquered at the instance of a private creditor, in spite of the large body of evidence to show the existence of such a rule. This bias of national courts is particularly noticeable in the case of admiralty courts administering prize law, as in the judgments of the British courts during the Napoleonic wars and the United States courts during the American Civil War, where rules of contraband and blockade were laid down for which no general custom of the nations could possibly be claimed. By contrast with national courts the decisions of international courts of arbitration would seem to offer more reliable evidence of the law. But the history of such cases shows that it has too often happened that the arbitral court has rendered its award rather in the form of a compromise satisfactory to both parties than in the form of a judicial decision on the law.

In addition to the uncertainty of custom there are other difficulties which impair its value as a source of international law. In the first place custom is of too slow growth to keep pace with the changing relations of the states which it endeavors to regulate. In the absence of international statutes sweeping aside the traditions of the customary law, as statutes of Parliament from time to time swept aside the outworn traditions of the English common law, international law has in many of its important features lagged far behind the newer phases of international relations brought about by the social and commercial intercourse of modern times. The development of democratic and constitutional governments and the increasing complexity of international finance and trade have left the law of nations practically unchanged. The theory of the sovereignty of the state is substantially what it was when states were, by comparison with present conditions, isolated units economically as well as politically independent. The tide of immigration from Europe to America which set in with the second quarter of the 19th century found the British and American courts still clinging to the old doctrine of indelible allegiance, and while the executive and legislative departments of the American government were struggling to introduce a new rule of expatriation more in accordance with the new conditions, the judicial department as expounder of the existing law remained unmoved. Even to-day it can scarcely be said that the right of expatriation is a principle of international law.

Instances of this tendency of customary law to cling to the past might be multiplied indefinitely. Perhaps the most striking example of its failure to adapt itself to the new conditions is to be found in the recent controversy between the United States and the Teutonic powers with regard to the right of citizens of a neutral state to sell arms and ammunition to a belligerent. There can be no doubt that when Jefferson, in answer to the complaints of the British minister that French agents were buying arms in the United States, asserted in 1793 that such commerce was not in violation of the law of nations, his interpretation of neutral obligation was correct. The same position was taken by successive Secretaries of State during the 19th century, and as late as 1907 a formal convention of the Second Hague Conference confirmed the traditional rule. Yet all the while the conditions of international life were changing and no account was taken of them. In the case of the United States as presented to the tribunal of arbitration at Geneva in 1871-2, an attempt was made by the United States to introduce an exception to the rule in cases where merchant vessels of the enemy had carried on in a neutral port such an extensive commerce in arti-

cles of war as to constitute the neutral port the main if not the only base of military supplies. But the contention of the United States could not be applied as a rule of law simply because it dealt with circumstances which had not arisen before and with regard to which there were no precedents. By an odd coincidence the very argument made by the United States at Geneva was repeated by Germany in 1915. The German government contended in a memorandum of April 4th that the United States was "the only neutral country in a position to furnish war materials" and that the conception of neutrality was thereby "given a new purport, independently of the formal question of hitherto existing law"; moreover, "an entirely new industry" had been created. In reply the United States urged that the shipments of arms were in accordance with the accepted law of neutrality, and that any change in such laws in time of war would be itself in violation of neutrality. Conceding the validity of the answer of the United States on the point of traditional law, it can scarcely be denied that conditions were such as to call for a new rule. While the old law has the advantage of rendering less necessary elaborate preparations for war in the case of a state to which neutral trade is accessible, it presents the anomaly of a nation legally neutral yet practically an ally of the enemy.

A further defect of custom as a source of international law is its inability to reorganize a system which is defective as a whole, or even to amend certain parts of it along progressive lines looking to the future. Most of the important reforms of international law have come about by the action of a single state or group of states asserting rights not previously acknowledged and maintaining them in the face of opposition, until at last the inherent justice of the claim, aided by the power of the states supporting it, has come to obtain general acceptance. To cite one instance out of many, the rights and obligations of neutrality were far from clear when Jefferson laid down certain principles to be followed by the United States government during the war between France and Great Britain in 1793-4. A Neutrality Act was passed pronouncing definitely that certain acts, whether of citizen or of alien, would be considered by the United States as a violation of its neutrality, and penalizing them as crimes against the law of the state. That the law of the United States went beyond existing international obligations is unquestionable, but the principles it embodied in due time found their way into the general code of international conduct, and may now be found in various articles of the 5th and 13th Conventions adopted at the Second Hague Conference. An additional instance is to be found in the principles advanced by the First and

Second "Armed Neutrality", which were first asserted in resistance to the practices of Great Britain, and which with one exception ultimately won general recognition as the correct rule of law.

A second form of contractual obligation between the nations is the explicit acceptance of a given rule by the adoption of a formal treaty stipulating for it. But it must be noted, contrary to a common misconception, that treaties are only sources of international law when adopted by the nations as a body. Treaties between two individual nations embody merely the consent of the parties to them, and therefore have no effect upon the relations of other states. It has, however, happened that on a few points international law has developed from bilateral agreements between the states of the world taken two by two; in illustration of which may be mentioned the numerous treaties of extradition which have undoubtedly made the general practice of returning fugitive criminals an accepted rule of international law, though still lacking in recognition by the nations collectively. On the other hand it has sometimes happened that when all or a majority of the great powers have been parties to a treaty, as for example the Declaration of Paris of 1856, the weight of their influence has been thrown in favor of the adoption of the rule in question by other nations, so that in due time it has become part of the general law. This transition from limited to general law has sometimes been expressly provided for in the treaty itself by a clause inviting nations not parties to it to adhere to it.

It is only since the meeting of the First Hague Conference in 1899 that treaties have come to be a direct source of international law. At that Conference important agreements were entered into by the whole body of states, which gave universal application to certain existing usages of limited practice, abolished certain others, prescribed new rules of international conduct, defined rights and imposed definite obligations. The Hague Conference of 1907 went still further in concluding general conventions, though as in the case of the Conference of 1899 the agreements relate for the most part to the conduct of war. It is important, however, to note that before those conventions can be regarded as part of the settled law, a condition attached to them, to the effect that a particular convention may at any time be denounced by the parties to it upon giving due notice, must be removed. This may be done in either of two ways: by the direct rejection of the right of denunciation by means of a formal agreement to that effect, or by the gradual loss of the right when the subject-matter of the convention has grown into a rule of customary law. A further point of importance to be noted in judging of the authority of the Hague conventions is that

many of their provisions merely codify existing custom, and in consequence the rule so codified continues to be binding even though the formal convention should fail of ratification or be denounced after having been ratified. Hence the excuse made in the present war for the violation of certain provisions of the Hague conventions, that the particular convention had not been signed by all the belligerents, is of no value if the rule was previously part of the customary law.

In the face of the inherent defects in the sources from which international law is drawn it is not difficult to understand why the law has failed to keep in touch with the needs of the times. The problem now presented is whether the reform of the law can be accomplished along the lines followed in the past or whether a new and more constructive system must be introduced in the form of an international legislative body capable of amending old rules and introducing new ones by authoritative decree. It is doubtful if the nations will continue to be satisfied with the old methods. What statutes have done for the development of the common law the acts of an international parliament must do for the development of international law. Rights and duties must be more definitely defined, the restrictions upon the sovereignty of the state, now a sort of twilight zone in international relations, must be brought out into the light, and a clear rule of intervention, no longer individual but collective, must be adopted. The equality of nations must be given a legal meaning and outworn theories, long since negatived in practice, must be formally discarded. Rights of property, at present in a state of utter confusion, must be rearranged and systematized to meet the demands of international peace. Present treaty rights must be changed to give them, in respect to interpretation and binding force, more of the status of contract at private law. These and other radical amendments in the law are vitally needed, and the slow process of customary observance together with the conditional and half-hearted agreements of the Hague conventions are simply inadequate to bring them about.

It is not difficult to understand that if the substance of international law can be amended so as to give greater clearness and precision to the rights and obligations of nations the settlement of international disputes by judicial methods will be greatly facilitated. However perfect the machinery of courts of arbitration, it cannot be expected that the nations will resort freely to them in the absence of a more definite code of law. Hitherto the nations have been asked to submit their claims to a court possessing no judicial traditions and no recognized rule of decision, and in consequence

where arbitration has been resorted to in the past it has frequently been necessary for the parties to frame a special agreement in advance stipulating the principles which are to govern the decision of the case. The difficulty of framing this rule has often been as great as the difficulty of obtaining the consent of the parties to arbitrate. Moreover in the case of general arbitration treaties which provide for the settlement of future disputes the exceptions from the agreement to arbitrate, noticeable in the treaties of 1908, of questions relating to honor and vital interests are without logical foundation, except in so far as many of the important rights of nations are still in a state of uncertainty. The distinction between justiciable and non-justiciable questions is likewise called for by the defects of the law. All questions between citizen and citizen of the state are justiciable, and all questions between nations could in point of law be made so if the law were clear upon the rights and obligations of the parties. What are commonly called political disputes, and as such not regarded as susceptible of decision by arbitral courts, are nothing more than the conflicting claims of nations in cases where there is no definite rule of decision. They are disputes arising out of the old theory of sovereignty which has stubbornly held its own through all the modern period of international development. They can be brought under the law only when the source from which they spring has been subjected to legal restrictions.

The establishment of an international court of arbitration with truly judicial functions is one of the most important demands of the new era of international reorganization. But this court, as we have seen, is largely dependent upon the existence of an international legislature, if it is to extend its jurisdiction over the many cases now excluded from it. Nothing less than the enactment of positive rules of law will succeed in establishing the international court in a position of authority over the states in those cases where recourse to a court of justice is most needed. In the future the development of the substantive law must, if not precede, at least go hand in hand with the development of the law of procedure.

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